

Complaint Investigation Report
Parent v. MSAD #70; CDS Aroostook.
Complaint 21.002C
Complaint Investigator: David C. Webb
September 15, 2020

I. Identifying Information

Complainant: _____, Parent

Respondents: Stephen Fitzpatrick, Superintendent; Child Development Services (CDS); Roy Fowler, CDS State Director; Lori Whittemore, Director, CDS Aroostook; and Sandy Flacke, Special Education Director, MSAD #70.

Student: _____ (“Student”)
DOB _____

II. Summary of Complaint Investigation Activities

On July 21, 2020, the Maine Department of Education received this complaint. The complaint investigator was appointed on July 22, 2020.

The complaint investigator received 22 pages of documents from the Parent and 191 pages of documents from the Districts. Interviews were conducted with the following people: the Student’s Parent; Dr. Sandy Flacke, Director of Special Education, MSAD #70; Lisa Wilson, _____ teacher, MSAD #70; Lori Whittemore, Director CDS Aroostook; Tamra Robertson, CDS Aroostook Assistant Regional Site Director; Katelyn Clockedile, CDS Aroostook IEP Coordinator; Becky Gilman, CDS Aroostook Educational Consultant; Megan Barnes, Program Coordinator Aroostook _____ (“_____”); Madeline Pelletier, teacher, and Chuck Moody, the Student’s case manager at Community Health and Counseling.

III. Preliminary Statement

The f _____ student resides with _____ mother in _____, Maine and with _____ father in _____, Maine. _____ has received services through Child Development Services (CDS) as a student identified under the disability of Other Health Impairment. The Student attended _____ at MSAD #70 during the 2019-2020 school year, however CDS is responsible for the provision of the Student’s services until _____ begins _____ at the beginning of the 2020-2021 school year.¹

This complaint was filed by the Student’s mother (“Parent”) alleging that the CDS Aroostook and MSAD #70 violated the Maine Unified Special Education Regulations (“MUSER”). After the receipt of the Parent’s complaint, a draft allegations letter was sent to

¹ The Student is now registered to start _____ at _____ School in _____, which is part of MSAD/RSU #29.

the parties by the Complaint Investigator on July 23, 2020 alleging five separate violations of MUSER. A telephonic Complaint Investigation Meeting was held on July 30, 2020.

In an e-mail dated July 22, 2020, Eric Herlan, Esq., counsel to MSAD #70, challenged the sufficiency of the Student's due process complaint request with regard to MSAD #70. In support of its sufficiency challenge, MSAD #70 argued that the complaint is unclear with regard to the school administrative unit responsible for the Student's programming, "what actions (or inactions) are being challenged" and what the Parent is seeking as a resolution.

In a letter dated July 24, 2020, the Department determined that the Parent had provided sufficient notice as required by MUSER XVI.4.B and therefor MSAD #70's sufficiency challenge was denied.

After an initial review of documents and witness interviews, the Complaint Investigator identified two ancillary issues and notified the parties with an amended allegations letter on August 21, 2020. MSAD #70 filed a response to the amended allegations letter on August 26, 2020. CDS Aroostook did not file a response to the amended allegations letter.

Responsibility for services to the Student between educational agencies.

Both CDS Aroostook and MSAD #70 have provided services for the Student or have undertaken IEP team responsibility during the time periods covered by this complaint investigation. The interrelationship between CDS and local educational units is set forth in 20-A M.R.S. §7209(3) and MUSER §VI.2.C.2.

20-A M.R.S. §7209(3) establishes CDS as an "intermediate educational unit for the provision of services under the IDEA to children at least 3 years of age and under 6 years of age, and provides in relevant part:

The department shall serve as the lead agency for the statewide system pursuant to 20 United States Code, Section 1435, including the identification and coordination of all available resources within the State for services to eligible children from birth to under 3 years of age, and shall exercise general supervisory authority over child find as provided in 20 United States Code, Section 1412 (a) (3) and the provision of a free, appropriate public education to children at least 3 years of age and under 6 years of age. 20-A M.R.S. §7209(3).

During the Student's transition from CDS to public school, MUSER §VI.2.C.2., specifies in relevant part:

- a) The regional CDS is responsible to convene a joint IEP Team Meeting in the spring of the year prior to a child's right to enroll in a public school. The receiving SAU will be responsible for the facilitation, development of IEP amendments, and Written Notice for this joint meeting.

- b) The regional CDS site remains responsible for those extended school year services which are specified on a child’s IEP until the start of the regular school year in which the child is eligible for enrollment in the public school.
- c) An SAU’s responsibility for the provision of FAPE to an eligible child who resides within its unit and who turns five on or before October 15th begins on the first day that children attend classes at the start of the school year.

Accordingly, even though the Student attended MSAD #70’s public program during the 2019-2020 school year, CDS retains FAPE responsibility for the Student until transitions to kindergarten. MSAD #70 was responsible for the facilitation, development of IEP amendments and the written notice in connection with the May 14, 2020 joint meeting.²

IV. Allegations

- 1. Not following required child find procedures in violation of MUSER §IV.2;
- 2. Not fully and adequately implementing the Student's IEP in violation of MUSER §IX.3.B(3);
- 3. Not adequately considering the concerns of or including the Parent in the IEP decision making process in violation of MUSER §§V1.2 (H) and (I) and IX.3.C(1)(b);
- 4. Not providing the Parent with proper prior written notice of the Districts’ proposals regarding the Student's educational program in violation of MUSER VI.2.A, MUSER App. I (34 CFR §300.503) and MUSER App. 1 (34 CFR 300.501 (b) and (c)); and
- 5. Not ensuring that a continuum of alternative placements is available to meet the Student’s educational needs in violation of MUSER §X.2.B.

Ancillary Issues

- 6. Not following required evaluation procedures in violation of MUSER §V; and
- 7. Not considering existing evaluation data and the academic, developmental and functional needs of the Student when developing IEP in violation of MUSER §IX.3.C (1)(c) and (d);

The Complaint Investigator reviewed all documents, information, and responses from the parties.

V. FACTUAL FINDINGS

- 1. The five year-old Student resides with his adoptive mother in _____, Maine and with _____ adoptive father in _____, Maine.³ The Parents took custody of the Student when he was eight months old and adopted _____ from biological mother in 2017 when the Student was _____ years old. The Student

² Unless otherwise noted, references to “the District” means CDS Aroostook.

³ The Student’s parents are divorced and the Student splits _____ time between _____ father’s house in _____ (MSAD 70) and _____ mother’s in _____ (RSU 29).

was born six weeks early with _____ in _____ system and was in the neonatal intensive care unit where _____ was treated for _____.

2. In May 2017, the Student received a Psychological Evaluation by Glen Davis in which _____ received the diagnoses of “Other Specified Attention Deficit Hyperactivity Disorder; Regulatory Disorder, and a Sensory Processing-Stimulation-Seeking/Impulsive Disorder (Moderate-Severe).”
3. The Student attended _____ private school during the 2018-2019 school year. On December 5, 2018 the Parent requested that the Student be screened for a possible disability or need for special education services based upon behavioral issues and concerns.
4. On December 31, 2018, the Student’s case manager made a referral to the IEP team with a suspected disability of ADHD. In the referral form, the Student’s teacher noted:

Teachers are unable to handle [the Student] at school. _____ screams, yells, and hollers. _____ was diagnosed with ADHD and are trying to find a medication to work. They have not been able to find something that fits _____. It has been an emotional struggle to get _____ stable on any medication. _____ teacher reports that _____ can be stubborn and shows plenty of behavior: throwing things across the room, peeing on the wall in the bathroom stall, running everywhere, talks during circle time while laughing profusely, crawls under the table, taunts the teacher to come get _____ gets frustrated easily. _____ does not participate or answer all the teacher’s questions, but when being observed during free time she can hear _____ is getting the content.
5. An “informal observation” was conducted on January 22, 2019 by Katelyn Clockedile. The one hour and 15 minute observation noted numerous instances of the Student’s misbehaving and disruptive behaviors in class.
6. A “Dial Four”⁴ screening of the Student’s gross and fine motor skills, cognitive development, and speech and language skills was completed on January 22, 2019. Results of this screening supported a referral for further evaluation.
7. On January 31, 2019, CDS received signed parental consent to evaluate.
8. An evaluation was completed by Becky Gilman on March 1, 2019 which revealed:
 - a) The Student’s “school readiness composite” (pre-academic) skills fell within the average range and _____ total composite fell within the low average range.
 - b) The Student’s overall development and developmental milestones assessment fell within the mild delay range with a standard score of 79 and a percentile rank of 8.⁵ The report concluded: “The Student scored in the delay range on the Personal-Social domain, with _____ adult and peer

⁴ Developmental Indicators for the Assessment of Learning, fourth ed.

⁵ This assessment is based on the Battle Developmental Inventory (BDI-II)- an early childhood instrument based on the concept of developmental milestones. Standard Scores between 85 and 115 are considered to be in the average range. Scaled Scores between 7 and 13 are considered to be within the average range. The Student received a Personal-Social Quotient standard score of 68 (2nd percentile), an Adult Interaction scaled score of 3 (1st percentile), a Peer Interaction scaled score of 2 (below 1st percentile) and an Adaptive Quotient - Personal Responsibility- scaled score of 3.

interaction falling within the delay range and self-concept and social role falling within the low average range. communication skills fell within the average range, motor skills fell within the low average range, adaptive and cognitive skills fell within the mild delay range.”

- c) The Parent/Primary Caregiver Form and Teacher/Daycare Provider General Adaptive Composite (GAC) fell within the borderline range in the home and school settings.⁶ This form indicated that the Student “appears to struggle with self-direction, and social skills.”
 - d) The Student’s social skills evaluation revealed that the Student “fell within the below average range and that is displaying problem behaviors that fall within the well above average range.”⁷
 - e) The Conners Early Childhood exam⁸ demonstrated very elevated behaviors in school and home settings, with inattention/hyperactivity, defiant/aggressive, mood and affect, and physical symptoms all falling within the very elevated range in both settings.⁹
- 9.** A CDS initial eligibility observation dated March 1, 2019 noted that “the Student struggled with attending to a teacher’s task and following teacher directions. can be impulsive and gets easily distracted. These behaviors have an impact on learning and social skills. They may have an adverse effect on educational performance.”
- 10.** At an IEP Team meeting on March 26, 2019, Becky Gilman, Educational Consultant, noted that the Student “struggles with attending to a teacher task and following teacher directions.” The report also noted that the Student “can be impulsive and get easily distracted” [and] exhibits behaviors that impede learning or that of other student [which] may have an adverse effect on educational performance.” The report concluded needed “positive behavioral interventions and supports and other strategies to address these behaviors.”
- 11.** At the March 26, 2019 IEP Team meeting, the Student was determined to be eligible for special education services under the criteria of Other Health Impairment. The Student’s IEP included the following:
- a) Specially Designed Instruction 1:1 (regular education classroom): 4x week/2.5 hour sessions;

⁶ (ABAS-III) is an early childhood instrument that evaluates adaptive skills- skills necessary for people to live independently and to function safely and appropriately in daily life. Standard Scores between 90 and 110 are considered to be in the average range. Scaled Scores between 8 and 12 are considered to be within the average range. Self Direction- Scaled Score: 5; Social Composite: Standard Score: 76; Social- Scaled Score: 6 Practical Composite- Standard Score: 80; School Living- Scaled Score: 4.

⁷ The Social Skills Improvement System SSIS Rating Scales assesses three domains: Social Skills, Problem Behaviors, and Academic Competence. The SSIS represents learned behaviors that promote positive interactions while simultaneously discouraging negative interactions when applied to appropriate social situations. The social skills behaviors include the following subdomains: Communication, Cooperation, Assertion, Responsibility, Empathy, Engagement, and Self-Control.

⁸ The Conners EC assesses a wide range of behavioral, emotional, and social concerns in preschool-aged children

⁹ Expressive School Readiness Composite score of 102, with a percentile rank of 55; Expressive Total Composite 88, Percentile Rank 21; Social Skills: standard score 72, Percentile 4; Problem Behaviors: standard score 98, Percentile 51.

- b) Specially Designed Instruction 1:1 (special education classroom): 4x week/1 hour sessions;
 - c) BCBA Consultation: 2 hours monthly;
 - d) Transportation – 4x week, to/from special education and/or related services.
12. The IEP developed on March 26, 2019 provided the following supplemental aides, services, modifications and supports in regular education classroom: Preferential seating, visual prompts, consistent rules, social stories, adult modeling and demonstration and consistent, ongoing positive reinforcement.
13. The March 26, 2019 IEP provided the following measurable goals:
- a) By 03/25/2020, with the use of visuals and models, [the Student] will share play materials with peers in one out of two opportunities over four consecutive sessions as measured by teacher reporting and data collection;
 - b) By 03/25/2020, with the use of visuals and modeling, [the Student] will attend to a large group activity for up to five minutes, as demonstrated by the Student remaining in spot, with two prompts, at least once per day for four consecutive school days, as measured by teacher reporting and classroom observation;
 - c) By 03/25/2020, with the use of visuals and modeling, [the Student] will attend to a small group activity for up to five minutes, as demonstrated by the Student completing the activity without argument or complaint, in a reasonable amount of time, with two prompts, at least once per day for four consecutive school days, as measured by teacher report and classroom observation; and,
 - d) By 03/25/2020, with the use of visuals and prompts; [the Student] will follow a verbally presented, two-step adult instruction without argument or complaint, with no more than one additional prompt, four out of five opportunities, over four consecutive school days, as measured by teacher and therapist reports.
14. A Determination of Adverse Effect on Educational Performance form dated March 26, 2019 confirmed that the Student’s evaluation scores, observations, social/emotional deficits and disciplinary evidence demonstrated an adverse effect on educational performance.
15. On April 4, 2019, CDS received signed Parental Consent for Initial Provision of Services. CDS then sent a referral to Aroostook County Action Program (“ ”) to provide special education services for the Student.¹⁰ At the time of the eligibility meeting, however, did not have an available opening for the Student until June 24, 2019.
16. The Student began attending on June 24, 2019 and attended twenty-four sessions through August 15, 2019.
17. Beginning in September, 2019, the Student attended the morning half-day public program offered by CDS and afternoon sessions at where continued to receive special education programming. Lisa Wilson was the Student’s teacher at CDS and primary teacher was Maddie Pelletier.

¹⁰ According to Lori Whittemore, is the primary provider of special education programming and services for CDS Aroostook.

18. On September 23, 2019, an Advance Written Notice of an IEP Team meeting on October 22, 2019 was sent to the Parents to “talk about progress at _____”.
19. On October 21, 2019, Tamra Robertson, CDS Regional Site Director completed an informal observation of the Student at _____ School. Ms. Robertson reported that the Student “sat and participated the whole time. _____ followed directions and commented about the story read to the group.” Ms. Robertson noted in her report that she spoke with Ms. Wilson, who told her that the observation was “a typical day” for the Student, and that she has only had “a couple of issues” with the Student.
20. As a result of the informal observation, the team determined on October 22, 2019 that the Student no longer needed specially designed instruction or BCBA services. The IEP team amended the Student’s IEP to provide three hours annually of Special Educational Consultation at _____ School within _____ regular education classroom. The written notice from this meeting reported that the Student: “will no longer receive access to adult support at _____ as of November 4, 2019, which is paid for by CDS. _____ will be in contact with _____ parents to get a completed application to see if _____ qualifies for Head Start Services and is able to continue attending.” The team determined at this meeting, however, that the Student would receive the following additional evaluations: Academic/Developmental, Behavior Rating Scales, and Occupational Therapy.
21. At the IEP meeting on October 22nd, 2019, the IEP team requested an educational evaluation, behavior Rating Scales and an occupational therapy evaluation. Parental consent to complete the evaluations was received on October 30th, 2019.
22. In an interview with the Complaint Investigator, Lori Whittemore, Director CDS Aroostook, stated as follows:
- The Student did “really well” at _____ and by the time _____ had concluded _____ program, _____ met all of _____ goals at 100%.
 - At the October 2019 IEP team meeting, the team considered Tamra Robertson’s classroom observations and the Student’s summer session data from _____.
 - The team did not have _____ fall data or progress reports which were not due until the end of the quarter. Based on that information which showed that the Student had met _____ goals, CDS discontinued _____ services for the Student.¹¹
 - Becky Gilman, the Student’s evaluator, did not raise any concerns about the Student.
 - Even though _____ didn’t have openings for the Student until June, 2019, CDS could have offered some programming and supports for the Student during the time that _____ was waiting to start at _____.
23. In an interview with the Complaint Investigator, Tamra Robertson, Assistant Regional Site Director of CDS Aroostook, stated as follows:

¹¹ A chart prepared by _____ tracking the Student’s progress towards _____ IEP Goals was provided by CDS for the periods of July 8, 2019-August 15, 2019 and September 9, 2019-October 17, 2019.

- a) After the Student was identified and determined eligible for special education services in March, 2019, there were no openings at . As a result, the Student’s IEP was not implemented on a timely basis. After the CDS learned about the lack of openings at , it should have convened a team meeting to determine an alternative placement or services for the Student, however no meeting was held prior to the Student’s eventual placement at in late June, 2019.
 - b) At the October, 2019 IEP team meeting, CDS only had records on the Student from summer program between June and August, 2019.
 - c) On October 21, 2019, she sat in on the Student’s class at School with Ms. Wilson (MSAD #70) in order to observe prior to the IEP team meeting scheduled for October 22, 2019. She observed that the Student had made gains and according to her conversations with Ms. Wilson learned that the Student was easily redirected. Ms. Robertson did not know nor did she ask if Ms. Wilson had seen the Student’s IEP.
 - d) She reviewed the data provided and concluded that the Student was “doing excellent” and “making progress towards goals.” She only saw the reports through August, 2019 but understood that Megan Barnes, the representative at the meeting, had updated data. She didn’t see these reports and they were not handed out at the meeting.
 - e) She agrees that the Student’s evaluation should have been conducted before services were discontinued. She agrees that even though no longer received direct instruction after the October, 2019 meeting, the Student “could have used” additional social skills instruction, which was ultimately added back to IEP in May, 2020 “as a compromise” with the Parent.
- 24.** An evaluation was completed by Becky Gilman on December 9, 2019 which revealed that the Student’s school readiness composite (pre-academic) skills fell within the average range and total composite fell within the low average range. Comparing the Student’s Social Skills Improvement System (SSIS) scores indicate that in December 2019 the Student had fewer “problem behaviors”¹², but that the Student’s social skills had declined.¹³
- 25.** In an interview with the Complaint Investigator, Becky Gilman, M.Ed., an educational consultant at CDS and one of the Student’s evaluators, stated as follows:
- a) She has worked at CDS since 2011 and is in her fifth year as an educational consultant.
 - b) She evaluated the Student after initial referral to special education in March, 2019 and in December, 2019. She attended each of the Student’s IEP team meetings to discuss the results of her evaluations.
 - c) At the Student’s initial evaluation, she noted concerns with regard to the Student’s focus and need for “lots of redirection” in order to attend to a task. The results of second evaluation revealed continued struggles in

¹² Moving from the “well-above average range” in March, 2019 to the “average range” in December, 2019

¹³ SSIS results indicate that the Student’s score dropped by six points from a score of 78 in March of 2019 to a score of 72 in December of 2019.

the area of social skills and the Student's reduced fine motor skills. Specifically, the December, 2019 SSIS evaluation indicated that the Student's social skills had decreased by six points since March, 2019.

- d) While the IEP team determined on October 22, 2019 to only reevaluate the Student's behavior and social skills with the SSIS, she said that a standardized assessment such as the Battle Developmental Inventory should have been done before [redacted] was removed from [redacted] programming at [redacted]. She said that she administered the Battle to the Student in March, 2019 and it would have been a more accurate measure of the Student's progress. This was especially important due to the concerns regarding the Student's delayed social skills, [redacted] low cognition and [redacted] ability to adapt and take personal responsibility.
 - e) She also questioned the team's determination to discontinue programming based on Tamra Robertson's one hour classroom observation on October 21, 2019. Specifically, she said that it is difficult to get an accurate assessment of a student's progress based on this type of observation insofar as "sometimes a new face in classroom, can change how a child behaves" and is not usually a good indicator of a student's progress.
 - f) She noted that after the [redacted] program ended and the Student attended public school for both morning and afternoon sessions, the Student would easily get bored and fidgety in the afternoon session and was not academically challenged.
- 26.** The Student's occupational therapy evaluation was completed by Annette Cyr, OTR, on November 13, 2019. The results of this evaluation revealed that the Student had "below average grasping and visual motor integration skills as well as below average visual perceptual and visual motor skills. The evaluation indicated that the Student demonstrated some difficulties regarding crossing the midline and bilateral coordination as well. Ms. Cyr concluded that the Student would benefit from OT services including fine motor coordination to improve grasping and visual motor integration skills.
- 27.** CDS waited to review the evaluations for the annual review on March 3, 2020. This meeting was continued to a video format meeting on March 25, 2020 due to scheduling issues around the coronavirus pandemic. The Parents were notified but did not attend this meeting based on their understanding that the pandemic issues would be brief and they could attend an in-person meeting within a reasonable time thereafter.
- 28.** At the March 25, 2020 IEP team meeting, the team determined that the Student would "continue to receive three hours annually of special education consultation."
- 29.** On May 14, 2020 the Student's IEP team met to address evaluation/reevaluation and CDS-public school transition. MSAD #70 and CDS staff attended this meeting along with the Parent. At this meeting, the Written Notice indicated as follows:
- a) [The Student] will continue to receive Specially Designed Instruction. [redacted] will go from 4 hours weekly to receiving Social Skills group once a week for 30 minutes;

- b) The Team proposes that [the Student] receive Occupational Therapy twice a week for 30 minutes;
 - c) [The Student's] current accommodations continue to be appropriate and the following will be added:
 - 1. Positive praise
 - 2. Movement breaks
 - 3. Clear and concise consequences
 - 4. Seat in close proximity to the teacher
 - 5. Clear directions
 - 6. Re-do work to ensure quality
- 30.** The May 14, 2020 Written Notice further stated:
- a) "CDS will release [the Student] on 6/5/2020 due to [the Student] making the transition to public school in the Fall of 2020. The new IEP developed reflects all of the services [the Student] will receive up until release from CDS to when enters the public school setting in August of 2020."
 - b) "Due to CDS not reviewing evaluations done on 12/9/19 with parents, evaluations were reviewed and discussed during today's meeting."
- 31.** In an interview with the Complaint Investigator, Sandy Flacke, Special Education Director for MSAD #70 and MSAD #29, stated that MSAD #70 only received a portion of the Student's records prior to the transition meeting on May 14, 2020, with the most recent IEP from March 26, 2019. She believes this is why the Student's May 14, 2020 IEP incorrectly states "[The Student] *will continue* to receive Specially Designed Instruction. will go from 4 hours weekly to receiving Social Skills group once a week for 30 minutes." (emphasis added) Not aware of BCBA services being offered to the Student. Services to the Student could have "easily" been provided through MSAD #70 if there was a determination for this by the IEP team. The Student is now registered to start kindergarten in , which is part of RSU #29, the other district for which she serves as special education director. She said that the team has arranged for a Speech therapist to do an informal observation and referral and that the District has contracted with an occupational therapist to provide these services to the Student.
- 32.** On July 28, 2020, the IEP team met again via Zoom video conference. The SAU identified for this meeting was "CDS Aroostook." Lori Whittemore, CDS Director, offered ten hours of occupational therapy and ten hours of specially designed social skills instruction as compensatory services "to address the delay in reviewing the evaluations."¹⁴
- 33.** In an interview with the Complaint Investigator, the Parent stated:

¹⁴ The Written Notice for the July 28, 2020 IEP team meeting had significantly more detail with regard to the Student's "progress" than the October, 2019 Written Notice. The July 28, 2020 Written Notice included detail with regard to the Student's " progress towards goals" report from August 19, 2019 indicating that the Student's progress was "100%" on four out of five of goals. This information was not considered or referenced in earlier Written Notices. While the July 28, 2020 Written Notice referenced the Student's December, 2019 SSIS score, there was reference within earlier written notices that this score had decreased from the previous test in March, 2019.

- a) She and the Student's father share custody of the Student on a week on/week off basis. She reported that while she is primarily involved with interactions with the school, the Student's father and his wife are actively involved, cooperative and supportive.
- b) She works at the _____ where the Student was enrolled in the during the 2018-2019 school year.
- c) While the Student attended GHCA, _____ demonstrated consistently challenging and aggressive behaviors towards peers resulting in multiple disciplinary infractions and reports from other teachers.
- d) Based on the Student's escalating behaviors, the Parents requested that the Student be screened for a possible disability or need for special education services in December 2018.
- e) After the Student was identified as eligible for special education services in the spring of 2019, the only placement option was for the Student to attend _____. After _____ representatives informed the IEP team that it would not have an opening for the Student until late June, 2019, there was no follow up communication with the District regarding interim services or supports for the Student.
- f) She is concerned that the Student's apparent progress at _____ during the summer of 2019 is not a good indicator of _____ behavioral/social skills progress. In particular, the Parent noted that while the Student attended _____ during the summer, there were only one or two other kids with _____. She noted that it is much easier for the Student to control _____ behavior in a small group, and that _____ behaviors are very different with more kids in a typical school classroom of 15-20 other children.
- g) In September, 2019, the Student started _____ at _____ in the morning, and then attended _____ to receive _____ special education services in the afternoon.
- h) On October 21, 2019, when Ms. Robertson did her observation, the Student was the "line leader" which is a leadership position in class and where the Student had to "hold it together" as model student. In her view, this would not be a "typical day" for the Student.
- i) No one at the October 22, 2019 IEP team meeting knew the Student except for Becky Gilman, who only saw _____ briefly.
- j) The Student struggled with transitions and dealing with _____ peers. After _____ discontinued in October, 2019, the Student attended both morning and afternoons at _____; however, _____ often struggled during afternoon sessions.
- k) The Student did receive private OT services but didn't have OT or other supportive services at school.
- l) She was concerned about calls from school regarding behavior incidents after _____ discontinued, including an incident where the Student threw a chair at another child
- m) She recalled receiving notification about the meeting, but that she disagreed with the report in the Written Notice that she "agreed with the

recommendations.” The Parent reported being frustrated about having to apply for financial aid under a short deadline before services were discontinued.

- n) Although she was concerned about the discontinuation of special education services, she didn’t file complaint at the time as she “didn’t know it was an option.” (She did receive some documents from the District by mail but doesn’t recall getting notice of her right to file a complaint after she learned about discontinuing services.)
 - o) Following the evaluations conducted in December, 2019, she received notice of the evaluations but no meeting was held regarding the evaluations until May, 2020.
 - p) Initially, she was not willing to meet on video in March, 2020 as she was preferring to have the meeting in person and thought the COVID precautions would be brief. She has attended the last two IEP team meetings via zoom video conference.
34. In an interview with the Complaint Investigator, Chuck Moody, the Student’s case manager at Community Health and Counseling stated that has been working with the Student and family over the past year and that in addition to attending IEP team meetings also met with MSAD #70 and staff. Mr. Moody said that the Student’s social skills and behavior are biggest areas of need. Mr. Moody noted that the Student struggled with transitions and peer interactions, and that “afternoons were bad” after started attending for a full day in late October, 2019. also has concerns that program at , which only involved a small group of students, did not adequately prepare for interactions with larger groups of children.
35. In an interview with the Complaint Investigator, Lisa Wilson, the Student’s regular education school teacher, stated as follows
- a) She worked with the Student from September, 2019 thru March, 2020. During the period from September 2019 until late October, 2019, the Student would spend mornings with her at the MSAD #70 school and in the afternoons at the program.
 - b) She is not qualified as a special education teacher nor does she have any specific training in special education.
 - c) She observed the Student’s behaviors and aggression challenges, which she said were helped by attendance at in the afternoon.
 - d) She reviewed IEP and implemented classroom accommodations including reminders, preferential seating and verbal prompts
 - e) She regularly talked with the Student’s parents. She and the Student’s Parent used a daily communication book which went back and forth between home and school, documenting behaviors.¹⁵ She did not have contact with staff.

¹⁵ Date Narrative of undesired behaviors - teacher-parent notebook

sept 18	laying down a lot, not listening, time out (Parent wrote on notebook that “laying down is something used to do at ...when was overstimulated..”) <i>IEP Goals form used by IEP team noted on this day that was 100% compliant with all goals-</i>
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- f) At the observation meeting on October 21, 2019, the Student was designated as a “leader” for the day when behavior was usually better than during a typical day. She noted that behavior would deteriorate when more demands were placed on .
- g) She knew about but didn’t attend the October 22, 2019 IEP team meeting, however she thought it was just a “check in” meeting and was surprised to learn after the meeting that services were discontinued.
- h) She felt that the services and supports were helping the Student. After the Student’s services were discontinued, the Student spent full days at the MSAD #70 until the COVID closures in March, 2020. She noted that the Student’s behavior or social skills did not improve after discontinued and that did not receive any other direct or supportive special education services while was attending MSAD #70.
- i) After the COVID closure in March, she worked with the Student in a manner and frequency similar to other Students with sending classwork and papers home for the Student to work on some on-line learning and video conferences through the “Seesaw” platform.

19	struggled so much, needed lots of redirection, hard time following directions <i>IEP Goals form used by IEP team noted on this day that was 100% compliant with all goals-</i>
Oct. 7	needed redirection, laying down <i>IEP Goals form used by IEP team noted on this day that was 100% compliant with all goals-</i>
10	hard time staying on task and following directions <i>IEP Goals form used by IEP team noted on this day that was 100% compliant with all goals-</i>
24	hard day, not listening
29	difficulty listening and following directions (note from parent re “extreme behaviors at , kicking another child in the head, swinging chairs)
Nov. 4	am went well, pm difficulty staying on task
5	hard time staying on task-very distracted
6	am-OK needed some redirection, pm-difficulty following routine, not following directions
7	upset, not following directions
26	am great-pm hard time staying on task and needed a lot of redirection
Dec. 4	am good, pm complained/tired
5	am good, pm hard. Disobedient, not putting in effort, tired
9	am OK, pm not getting ready at bus time
11	interrupting, moving, needed several reminders, work time difficult, off task
18	am loud today, pm hard for tired, off task
Jan 7, 2020	not listening, not making good choices, work time messy and rushed
30	hard time staying on task, needed more redirecting
Feb. 4	not listening, needed redirection
6	rough time on bus, hard day, off task and unfocused
11	not getting ready, off task and silly
24	off task
25	hyper and impulsive, pushed everything over and created a bigger mess
26	said no to most directions, whined and complained
March 2	hard time sitting in space and off task at work time
3	rolling around at circle time, didn’t do work at work time, disobedient
4	needed lots of reminders
5	disobedient, interrupting
9	not listening, needing lots of reminders
12	very hyper and not listening-rough day

- 36.** In an interview with the Complaint Investigator, Katelyn Clockedile, the Student's case manager at CDS¹⁶ stated as follows:
- a) After the Student was identified for special education in March, 2019 and there were no openings at _____, CDS tried to do an "itinerant" program for _____, but there was an absence of staff to provide services. She said that the IEP team did not meet again to discuss any plans to provide alternative services or supports for the Student.
 - b) Maddie Pelletier, the Student's ed tech at _____, told her that the Student was doing well.
 - c) She recalls speaking to the Parent about scheduling the IEP meeting on September 23, 2019, and scheduling at a time that the Parent could attend. The purpose of the October 22, 2019 IEP team meeting was to "check on the Student's progress at _____. She feels that the decision to discontinue the Student's _____ services was premature and felt that to make a decision like this there should have been more thorough evaluations and the Parent and the Student's teacher should have been present. Although the teacher's supervisor Megan Barnes was present, she just started in her position a couple of days before the meeting and didn't have familiarity with the Student.
 - d) Because the team didn't have evaluation reports to allow the Student to be discharged from special education, the team determined that it would just provide three hours of consultation on an annual basis.
 - e) Even though it was called for in _____ IEP, the Student didn't get BCBA services at _____ or in the public school setting at MSAD #70.
- 37.** In an interview with the Complaint Investigator Megan Barnes, Program Coordinator of Education and Disabilities, stated as follows:
- a) The October 22, 2019 IEP team meeting was her first meeting in her position as Program Coordinator. She didn't have a lot of background on the Student and had to talk to _____ teacher, Maddie Pelletier.
 - b) Prior to the October 22, 2019 meeting, she learned that while the Student had some outbursts and struggles, _____ made very good progress and was "easily redirected." She noted that the Student's behaviors were not tracked, but that negative behaviors were "never consistent enough to track."
 - c) Although Maddie Pelletier didn't attend the October 2019 meeting as "the system didn't allow for that", she has changed the policy so that now all ed techs attend IEP team meetings in order "to be more efficient and accurate."
 - d) The Student did not receive BCBA services since there were no BCBA's available, and then by the October, 2019 meeting, _____ no longer needed BCBA services."
 - e) Daily reports were prepared for the Student, with a written summary of each day's performance, which was sent by _____ on a weekly basis to CDS.
 - f) Even though the Student's summer program only had a total of three children, this would be considered a "large group" for purposes of meeting the Student's goal of participating in a "large group activity."

¹⁶ Ms. Clockedile is not a certified special education teacher but is a certified Ed Tech III.

- g) Once CDS discontinued services at _____, it offered to help the Parent apply for financial aid for the Student to continue to attend, but the Parent didn't provide income statements.
- 38.** In an interview with the Complaint Investigator, Madeline Pelletier, the Student's teacher at _____, stated as follows:
- a) She started working with the Student in June of 2019 until the discontinuation of _____ services at _____ in October, 2019. During the Student's summer program (June-August), she provided 1:1 services for the Student. There were two other children in the class with the Student.
 - b) She is not a certified sped teacher but is certified as ed tech III. She provided instruction to the Student and was supervised by Kathy Bohles and Megan Barnes, both certified special education teachers.
 - c) She understood that one of the Student's goals was to "attend to a large group activity", however she marked _____ report as meeting this goal even though there were only 2 other children in _____ group. She did not make any notes in _____ records regarding the number of other children in this activity.
 - d) During the Student's programming in the fall of 2019, Jackie Tompkins, another ed tech at _____, provided the Student's special education services while she was supervised by Maddie Pelletier. There were a total of 12 students in the Student's fall class.
 - e) The Student did not have BCBA consultation during _____ time at _____.
 - f) She was not invited to the October 22, 2019 IEP team meeting which she characterized as "quite frustrating" since she knew the Student and felt like she could offer more accurate information about _____ experience in her classroom. She said that prior to this meeting she gave her notes to Megan Barnes (which she later explained consisted of the daily progress sheets provided by the District). She didn't recall if she had a conversation with Megan prior to this meeting.
 - g) She didn't see any significant problem behaviors with the Student during her time working with _____, and if _____ did act out, _____ was able to redirect or be redirected. She also didn't have concerns with _____ social skills felt that _____ was able to connect with _____ peers.

Discussion:

1. Not following required child find procedures in violation of MUSER §IV.2.

PROCEDURAL NON-COMPLIANCE FOUND; NO DENIAL OF FAPE FOUND

Maine's child find obligation is set forth in MUSER §IV.2, which requires schools to maintain and implement policies to ensure that children who are in need of special education and related services are identified, located, and evaluated at public expense. MUSER §IV.2(A).

MUSER §IV.2 governs child find policies for children ages three through twenty, and states, in relevant part:

Each IEU or SAU shall develop a written policy, consistent with this rule (specifically section V), regarding referral to the IEP Team. All referrals to the IEP Team must be acted upon in a timely manner. The IEP Team shall review existing evaluation data and determine the need for additional evaluations. The IEP Team may conduct its review without a meeting (V.3.B). If additional evaluations are needed, the IEU must send a consent to evaluate form within 15 days of the receipt of referral.

(1) Date of referral receipt – The SAU’s policy on referral must define what date constitutes the receipt of a referral. The referral must be submitted in writing to the Special Education Director, authorized designee, or superintendent. An oral referral shall be reduced to writing by designated school personnel...

(3) Referral by parent – A parent may refer at any time. The parent of a child receiving general education interventions may request that the agency conduct a full and individual evaluation for possible eligibility determination at any time during the implementation of these general education interventions. MUSER IV.2 E

In *C.G. v. Five Town Comm. Sch. Dist.*, 2007 WL 494994, 25 (D. Me., Feb. 12, 2007), aff’d 513 F.3d 279 (1st Cir. 2008), the First Circuit Court of Appeals held that a "Child-Find duty is triggered when the state or [local educational agency] has reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability." *Id.*, citing *Dep’t of Educ. v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1194 (D. Haw. 2001) (citations and internal punctuation omitted). Federal regulations specify that a state’s Child Find policies also must include children who are suspected of being a child with a disability under 34 C.F.R. §300.8 and in need of special education, even though they are advancing from grade to grade. 34 C.F.R. § 300.111(c).

In the present case, Parent requested on December 5, 2018 that the Student be screened for a possible disability or need for special education services based upon behavioral issues and concerns.¹⁷ On December 31, 2018, the Student’s case manager made a referral to the IEP team with a suspected disability of ADHD. A Dial Four screening of the Student’s gross and fine motor skills, cognitive development, and speech and language skills was completed on January 22, 2019. Results of this screening supported a referral for further evaluation. On January 31, 2019, CDS received signed parental consent to evaluate. Evaluations were completed by Becky Gilman on March 1, 2019 and on March 26, 2019 the Student was determined to be eligible for special education services under the criteria of Other Health Impairment.

The District’s child find policy provides that a child find referral is made on the same day as the referral form is received at Central Office and is given to the IEP team coordinator. The policy also requires that the screening shall occur within 10 school days of intake. MUSER §IV.2.C. The screening process did not occur until January 22, 2019, outside of the required

¹⁷ In light of the one-year review period covered by this investigation under MUSER XVI.4.B (3), a detailed review of whether the District had reason to suspect a disability prior to this time was not performed.

timeframe. Accordingly, a procedural violation occurred when the screening did not occur within the time frames required by CDS policy or MUSER IV.2 E.¹⁸

2. Not fully and adequately implementing the Student's IEP in violation of MUSER §IX.3.B(3);

5. Not ensuring that a continuum of alternative placements is available to meet the Student's educational needs in violation of MUSER §X.2.B.

NON-COMPLIANCE FOUND; DENIAL OF FAPE FOUND

MUSER §X.2.B. defines the criteria for an SAU's obligation to provide a continuum of alternative placements for students as follows:

Each SAU must ensure that a continuum of alternate placements is available to meet the needs of children with disabilities for special education and related services. The continuum required must include the alternative placements in the definition of special education under 34 CFR 300.39 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with the regular class placement. [34 CFR 300.115] Comparable facilities – facilities in which special education services are provided to children with disabilities shall be comparable to those in which regular education is provided to children and located in chronologically age appropriate settings.

Because there is no “bright-line rule on the amount of benefit required of an appropriate IEP,” courts and hearing officers must use “an approach requiring a student-by-student analysis that carefully considers the student’s individual abilities.” *Ridgewood Bd. of Educ.*, 172 F.3d at 248 (decision-maker must “analyze the type and amount of learning” that a student is capable of when determining whether “meaningful benefit” has been provided). Whether a program provides a “meaningful benefit” however, must be individualized, based upon each student’s potential for advancement. *Polk v. Central Susquehanna Interm. Unit 16*, 853 F.2d 171, 180 (3d Cir. 1988). The educational benefit and least restrictive environment requirements operate in tandem to create a continuum of educational possibilities. *Roland M. v. Concord Sch. Comm.*, 910 F.2d 928, 993 (1st Cir. 1990).

The First Circuit Court of Appeals has declared that “the IDEA entitles qualifying children to services that target ‘all of [their] special needs,’ whether they be academic, physical, emotional, or social.” *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1089 (1st Cir. 1993) “Educational performance in Maine is more than just academics.” *Mr. and Mrs. I v. Maine*

¹⁸ While there were delays in the child find process, any such delays due to these violations were de minimis and did not result in a substantive violation of FAPE for the Student.

School Administrative District No. 55, U.S. Court of Appeals, First Circuit 06-1368 06-1422 107 LRP 11344, March 5, 2007.

In *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 989 (1st Cir. 1990), the First Circuit Court held:

Congress indubitably desired “effective results” and “demonstrable improvement” for the Act’s beneficiaries. *Burlington II*, 736 F.2d at 788. Hence, actual educational results are relevant to determining the efficiency of educators’ policy choices...The key to the conundrum is that, while academic potential is one factor to be considered, those who formulate IEPs must also consider what, if any, “related services,” 20 U.S.C. § 1401(17), are required to address a Student’s needs. *Irving Independent School Dist. V. Tatro*, 468 U.S. 883, 889-90 (1984); *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir.), cert. denied, 464 U.S. 864 (1983).

Among the related services which must be included as integral parts of an appropriate education are “such development, corrective, and other supportive services (including psychological services . . . and counseling services) as may be required to assist a handicapped child to benefit from special education.” 20 U.S.C. § 1401(17).

There is a two-part standard for determining the appropriateness of an IEP and placement. First, was the IEP developed in accordance with the Act’s extensive procedural requirements? Second, was the IEP reasonably calculated to enable the child to receive “educational benefits”? See *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley* (“*Rowley*”), 458 U.S. 176, 206 (1982); *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 27 (1st Cir. 2008). “Adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.” *Rowley*, 458 U.S. at 205.

The Supreme Court recently explained its *Rowley* standard by noting that educational programming must be “appropriately ambitious in light of a student’s circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.” *Endrew F. v. Douglas County School District RE-1*, 2017 WL 1066260 (Mar. 22, 2017). In *Endrew*, the Court explained:

The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians. Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

The *Andrew* court held that the “merely more than de minimis” educational benefit standard was insufficiently “demanding.” Id. at 1000-01

In addition to an SAU’s obligation to provide appropriate and ambitious educational programming, MUSER §IX.3.B(3) provides as follows regarding the implementation of a student’s IEP:

Each school administrative unit shall implement a child with a disability's Individualized Education Program as soon as possible following the IEP Meeting but no later than 30 days after the IEP Team's initial identification of the child as a child with a disability in need of special education and supportive services... If a school unit is unable to hire or contract with the professional staff necessary to implement a child’s Individualized Education Program, the SAU shall reconvene an IEP Team to identify alternative service options. This IEP Meeting shall occur no later than 30 days after the start of the school year or the date of the IEP Team's development of the IEP. The IEP Team shall determine any amendments to the IEP necessary to reflect the inability to commence services as originally anticipated by the IEP Team.

At the March 26, 2019 IEP Team meeting, the Student’s evaluator, Becky Gilman, reported that the Student can be impulsive, is easily distracted and exhibited behaviors that impede learning or that of other students. She concluded that the Student’s behaviors are having “an adverse effect on educational performance.” In the written notice, the team noted that the Student “struggles with responding to instructions given in a small group and initiating an appropriate task without being reminded. struggles with following adult direction with little or no resistance...”

The Student was determined to be eligible for special education services under the criteria of Other Health Impairment and that would receive 10 hours per week of 1:1 specially designed instruction in the regular education classroom, four hours per week of 1:1 specially designed instruction special education classroom and two hours per month of BCBA consultation.

In early April, 2019, CDS sent a referral to to provide special education services for the Student. staff responded that there were no openings for the Student until June, 2019. Despite CDS’s knowledge that services could not be provided on a timely basis, however, there is no evidence that CDS made any effort to hire or contract with another provider to implement the Student’s IEP. The Student, therefore, received no special education services until began attending on June 24, 2019. CDS also neglected to convene an IEP team meeting to address this issue as required by MUSER §IX.3.B(3).

Lori Whittemore acknowledged in her interview with the Complaint Investigator that CDS *could have* offered some programming and supports for the Student during the time that was waiting to start at . Sandy Flacke, Special Education Director for MSAD #70 and MSAD #29, also noted that special education services could have “easily” been provided to the

Student through MSAD #70 if there was a determination by the IEP team to do so. Additionally, although the Student's IEP provided for two hours per month of BCBA consultation, CDS neglected to provide any BCBA consultation services for the Student or staff working with the Student.

Finally, several witnesses and subsequent evaluation reports confirmed that the Student needed more services and supports than the three hours of annual consultation services offered by the IEP team at the October 22, 2019 meeting.¹⁹ Had the team considered some of these alternate services or supports for the Student, they could have avoided the "all or nothing" approach that was taken at this meeting. As a result, CDS violated MUSER §X.2.B. by neglecting to ensure that a continuum of alternative placements was available to the Student, thereby denying a FAPE.

3. Not adequately considering the concerns of or including the Parent in the IEP decision making process in violation of MUSER §§VI.2 (H) and (I) and IX.3.C(1)(b).

4. Not providing the Parent with proper prior written notice of the Districts' proposals regarding the Student's educational program in violation of MUSER VI.2.A, MUSER App. I (34 CFR §300.503) and MUSER App. 1 (34 CFR 300.501 (b) and (c)).

NO VIOLATION FOUND

MUSER §VI.2.A and 34 CFR 300.501 (b) and (c) provide that each SAU must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including, notifying parents of the meeting early enough, at least 7 days prior to the meeting, to ensure that they will have an opportunity to attend; and scheduling the meeting at a mutually agreed on time and place. The notice must indicate the purpose, time, and location of the meeting.

The parental participation provisions of 34 CFR 300.501 (b) and (c) provides in relevant part:

- (b) (1) The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to—
 - (i) The identification, evaluation, and educational placement of the child; and
 - (ii) The provision of FAPE to the child.

MUSER §VI.2.H states, in relevant part, that each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including:

¹⁹ Tamra Robertson stated that the Student "could have used" additional the social skills instruction, which was ultimately added back to IEP in May, 2020. Sandy Flacke stated that services to the Student could have "easily" been provided through MSAD #70 if there was a determination for this by the IEP team.

(a) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and

(b) Scheduling the meeting at a mutually agreed on time and place.

The notice must indicate the purpose, time, and location of the meeting and who will be in attendance, as well as the participation of other individuals on the IEP Team who have knowledge or special expertise about the child. MUSER §VI.2.H (2).

MUSER §VI.2.H (2) further provides that a meeting may be conducted *without* a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place, such as—

(a) Detailed records of telephone calls made or attempted and the results of those calls;

(b) Copies of correspondence sent to the parents and any responses received; and

(c) Detailed records of visits made to the parent’s home or place of employment and the results of those visits.

In the present case, Katelyn Clockedile, the IEP Coordinator for CDS, recalls speaking to the Parent about scheduling the IEP meeting on September 23, 2019, and scheduling at a time that the Parent could attend. An advance written notice was sent to the Parent on September 23, 2019. The purpose of the October 22, 2019 IEP team meeting was to “talk about the Student’s progress at _____.” The Parent did not recall this conversation, but stated that she may have received the advance written notice of the meeting.

CDS witnesses and documents credibly establish that notice was provided to the Parent. This is supported by Parent’s comment that she “may have” received the advance written notice of the meeting. The Parent confirmed that she was informed of the results of the October, 2019 IEP meeting.²⁰

As noted in MUSER VI(2)(I), the IEP Team should work toward consensus, but the SAU has *ultimate responsibility* to ensure that a child is appropriately evaluated; that the IEP includes the services that the child needs in order to receive FAPE; and that the child’s placement is in the least restrictive educational placement. (emphasis added). Although the Parents did not attend the October 22, 2019 team meeting, the record supports a finding that they attended each of the other IEP Team meetings during the relevant time periods, and their concerns and observations were routinely noted in each of the Written Notices corresponding to the IEP team meetings.

²⁰ The Parent recalled receiving notification about the meeting, but that she disagreed with the report in the Written Notice that she “agreed with the recommendations.” The Parent reported being frustrated about having to apply for financial aid under a short deadline before _____ services were discontinued.

7. Not considering existing evaluation data and the academic, developmental and functional needs of the Student when developing IEP in violation of MUSER §IX.3.C (1)(c) and (d);

NON-COMPLIANCE FOUND, DENIAL OF FAPE FOUND

MUSER §IX.3.C (1)(c) provides that in developing each child's IEP, the IEP Team must consider the results of the initial evaluation or most recent evaluation of the child. In *School Union #51* 26 IDELR 1193, 26 LRP 4557, (Maine, 1997), a case addressing the IEP team's responsibility to consider and review existing evaluations, the Hearing Officer found that a school district denied a 15-year-old ninth grader a FAPE when it failed to review an evaluation of the student. In the *School Union #51* case, the Hearing Officer held:

It is the responsibility of the PET to review all the existing evaluations in developing the program for a student... It appears from the record that the Speech/Language evaluation of September 1996 was never reviewed by the PET. This evaluation contains some excellent concrete academic recommendations that were never discussed and thus are not in the I.E.P. where they belong.

In the present case, the written notice from the October 22, 2019 IEP team meeting states that the team determined that the Student no longer needed specially designed instruction or BCBA services as a result of the informal, one-hour classroom observation conducted by Tamra Robertson on October 21, 2019. This observation was not performed as part of any updates to the assessments made by Becky Gilman, who conducted comprehensive evaluations for the Student in March, 2019. Ms. Gilman stated that an updated standardized assessment such as the Battle Developmental Inventory should have been done before the Student was removed from programming. Ms. Gilman questioned the reliability of Tamra Robertson's observation, noting that a "new face" in the classroom can change how a child behaves and is not usually a good indicator of a student's progress.²¹ It is also noteworthy that on the day of the observation, Ms. Wilson stated that Student was given a "leadership role" in class, which caused the Student's behavior to be "better" as compared to a typical day when [redacted] was not in a leadership role.

Neither the October 22, 2019 written notice nor any of the witnesses reported reviewing the Student's most recent evaluations, as required by MUSER §IX.3.C (1)(c). In her report for the October 22, IEP team meeting, Ms. Robertson stated that she relied on statements from the Student's teacher, Ms. Wilson, who is not qualified as a special education teacher nor does she have any specific training in special education or working with disabled children.²²

²¹ The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services. [34 CFR 300.302], MUSER § II.11.

²² Both Lori Whittemore and Tamra Robertson said that the team also reviewed at the October 2019 IEP meeting the Student's [redacted] performance record from [redacted] summer session, and that a verbal report of [redacted] progress was provided by Megan Barnes, although there is no record of this within the written notice from this meeting. There is likewise no record that the October 2019 IEP team considered information from Ms. Wilson in her parent/teacher log in which she reported to the Parent that the Student had negative and non-compliant

Surprisingly, the team agreed to have the Student undergo further evaluations *after* discontinuing the Student's specifically designed instruction at the October 2019 team meeting.²³ Unfortunately, the December, 2019 SSIS evaluation revealed that the Student's social skills *decreased* by six points since the same assessment was administered nine months earlier in March, 2019.

Procedural violations in the IEP process may be a FAPE violation if there is "some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits." *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990) A procedural violation rises to a FAPE violation when an SAU fails to conduct proper assessments and consequently fails to provide adequate services. *Dracut Sch. Comm. v. Bureau of Special Education Appeals*, 110 LRP 50313 (D. MA. 2010) citing *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202 (9th Cir. 2008).

In this case, CDS's failure to consider the existing evaluation data and the academic, developmental and functional needs of the Student resulted in the discontinuation of the Student's social skills training and behavioral supports. This training was a material part of the Student's IEP and helped with the attending to tasks and following teacher directions, maintaining focus and helping with impulsivity. Further, it was clear that the Student was benefitting from this part of instruction at .²⁴

The informal home-school communication log, which was also not considered by the IEP team, also confirms the Student's continued need for behavioral and social skills support. In the nine-week period between September 2019 and November 4, 2019 (the date that services at discontinued, there were six days that teacher reported behavior concerns or issues, for an average of *one negative behavior incident every seven school days*. In the period between November 4, 2019 and March 12, 2020 (when the communication log ends), the teacher reported 23 days where the Student had behavior incidents, for an average of *one negative behavior incident every three and one-half school days*. The Parent also reported that discontinued, the Student often struggled during afternoon sessions at MSAD #70.

behaviors on September 18, 19 and October 7 and 10, 2019. In fact, the records from these dates state that the Student was "100% compliant" with regard to meeting "all of IEP goals" which is in direct contradiction to the parent/teacher log, suggesting a lack of communication between the agencies. In addition to the Parents not being present, neither Maddie Pelletier or Lisa Wilson, who worked directly with the Student at and MSAD #70 were present at this meeting. Megan Barnes had just started in her position as Program Coordinator and had never met the Student, and "didn't have a lot of background on the Student and had to talk to the teacher."

²³ Additional evaluations ordered included Academic/Behavior rating scales and an OT evaluation. Tamra Robertson acknowledged that the Student's updated evaluations should have been conducted before services were discontinued, and that the Student "could have used" additional the social skills instruction.

²⁴ Multiple witnesses reported that the Student's attention and behaviors, especially in the afternoon sessions, were better during the time that was getting services at . CDS appeared to recognize the material nature of the Student's missed social skills training when it offered compensatory services for these missed services at the July 28, 2020 IEP team meeting.

While the Student made progress in certain areas, the record supports a finding that the Student was denied a FAPE as a result of the District's failure to consider existing evaluation data and the academic, developmental and functional needs of the Student.

8. Failure to follow required evaluation procedures in violation of MUSER §V.

NON-COMPLIANCE FOUND, DENIAL OF FAPE FOUND

Both Maine and Federal special education regulations require that students be evaluated in all areas of suspected disability, including "social and emotional status, general intelligence, academic performance, communicative status and motor abilities." MUSER §V(2)(C)(4); 34 C.F.R. § 300.304(c)(4).

Reevaluations of students are equally important under MUSER and the IDEA, but the law does not require that every time a school does a reevaluation of a student (other than a triennial evaluation), it must evaluate in all areas of suspected disability.²⁵ Given the Student's difficulties with behaviors and social skills, it is unclear why the District did not perform a more comprehensive reevaluation in those areas.²⁶ Had the October 22, 2019 IEP team reviewed the daily communication log reports from the Student's teacher, they would have also noted at least four instances since the start of school where the teacher reported troubling behaviors to the Parent, each of which was consistent with past behaviors for which services and supports were being provided.²⁷

MUSER §V.1.A (3)(a) and §V.1.B provide, in relevant part, that the initial and re-evaluations and IEP team determinations must be conducted within 60 calendar days of receiving parental consent for the evaluation for children in the CDS System. In this case, Parental consent to complete the educational evaluation, behavior rating scales and occupational therapy evaluations was received on October 30th, 2019. The educational and behavior rating scales evaluations were completed by Becky Gilman on December 9, 2019 and the Student's occupational therapy evaluation was completed by Annette Cyr, OTR, on November 13, 2019. The Student's IEP team, however, did not meet to consider these evaluations until May 14, 2020.²⁸

²⁵ MUSER § V.1.B(1) provides that reevaluations must occur when (a) If the SAU determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or (b) If the child's parent or teacher requests a reevaluation.

²⁶ Becky Gilman, the Student's evaluator, noted in the March, 2019 evaluations that the Student's behavior and social skill deficits as a "major impediment to learning." Ms. Gilman said that in addition to a "rating scales" evaluation like the SSIS, a standardized assessment such as the Battle Developmental Inventory should have been done before was removed from programming at . She said that she administered the Battle to the Student in March, 2019 and it would have been a more accurate measure of the Student's progress. This was especially important due to the concerns regarding the Student's delayed social skills, low cognition and ability to adapt and take personal responsibility.

²⁷ The team's due diligence would have also revealed inconsistencies with the reports on the days that the Student was non-compliant on days that reported that the Student was "100% compliant with all goals."

²⁸ CDS acknowledged its violation of MUSER § V.1.B(1) when it noted in the July, 2020 written notice: "Per our regulations, the IEP team should have met to review the evaluations by December 29th. CDS did not schedule a

This delay is especially concerning in due to the absence of *any* specially designed instruction or BCBA services to the Student *even after* the evaluations in November and December, 2019 revealed that the Student had ongoing social skills deficits and grasping/visual motor integration skills requiring occupational therapy services. As noted by Ms. Gilman, in light of the five month period between the evaluation and the IEP team meeting to discuss the results of the evaluation, it would have been appropriate to at least “check back in with parent and teachers” about the Student’s performance and behaviors immediately prior to the May, 2020 IEP team meeting.

VI. CORRECTIVE ACTION TO BE COMPLETED BY THE DISTRICT²⁹

1. The Student’s IEP team shall convene within 30 days of this report to:
 - a) Determine appropriate standardized behavior and social skills assessments for the Student, including, without limitation, assessments in the following areas:
 1. Psychological testing, behavior assessments, classroom observations, and an assessment of the Student’s need for counseling, a behavior support plan and other supportive services;
 2. An updated assessment of academic, intellectual & learning development, with a specific assessment of any deficiencies or decreases in the Student’s current level as a result of the lack of behavior and social service programming for the Student;
 2. Within 45 calendar days of receiving parental consent for the above evaluations, the Student’s IEP team shall review the findings of the evaluations to:
 - a) determine all necessary educational supportive services and specialized instruction that the Student requires, including emotional/social/behavioral support and additional academic supports;
 - b) determine compensatory education and services to be provided to the Student, for equity in light of the CDS Aroostook’s failure to provide any BCBA services for the Student during the period covered by this investigation or SDI services to the Student for the period of November 4, 2019 through the remainder of the 2019-2020 school year; and
 - c) Determine which, if any, of the above services or supports must be delivered via distance learning in light of the COVID 19 emergency and make appropriate provisions in the Student’s IEP so that said services may be delivered to .
3. The Student’s IEP team shall Amend the Student’s IEP to reflect all modifications of programming or services.

meeting in a timely manner, but rather decided to wait for the annual review in March.” While the March meeting was extended to May at the Parent’s request due to her preference to meet in person, CDS remains responsible for the initial delay and scheduling which should have occurred well before the pandemic issues began.

²⁹ In light of the finding that MSAD #70 is not responsible for any denial of FAPE for the Student, corrective action responsibility, including costs for assessments, training and compensatory services rests solely with CDS Aroostook.

4. CDS Aroostook shall schedule a training with a qualified provider for all appropriate staff members to review state and federal regulations with respect to IEP team responsibilities with a specific focus on the following:
 - a) Compliance with deadlines and documentation within the IEP process including responsibilities to reconvene IEP team meetings if services, supports or qualified staff can not be located within the timeframes required by state or federal special education regulations;
 - b) IEP decision making process and support for students with behavioral and social skills deficits including monitoring and tracking student behaviors and implementation of behavior plans.
5. The following compliance documentation shall be sent to the Due Process Office and the Parents:
 - a) a copy of the IEP;
 - b) copies of all evaluation reports;
 - c) a copy of the Written Notice; and
 - d) Copy of the staff training curriculum, trainers and staff members attending the training.